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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

JOHN R. CLELLAN,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth District and the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

JOAN KATHLEEN CLELLAN
Counsel of Record
P. O. Box 492
Galloway, Ohio 43119
(614) 561-8657
E-MAIL: jim.dandy60@yahoo.com

Counsel for Petitioner

April 19, 2011

QUESTIONS PRESENTED FOR REVIEW

I. Where an appellate court reviews an application for Reopening an Appeal based upon a claim of ineffective assistance of appellate counsel, may that court find failure to preserve and produce applicant's requested dash camera video-taped "confession" after arrest and position of attacker's car in road, potentially useful evidence and not materially exculpatory when such decision conflicts with established appellate case law?

II. Where an appellate court denies an application for Reopening an Appeal, as above-stated, may that court find failure to produce in discovery a deputy's statement presented second day of trial and entered into evidence by trial judge without defense counsel's objection, not prejudicial to Petitioner or to the outcome of his case, without examination of that officer's statement and reliance on the transcribed description of such evidence alone?

III. Where a "test case" for the "Castle Doctrine" is presented to a jury along with an improper proposed jury instruction regarding Ohio Revised Code Section 2901.05 that was further improperly modified by the trial court, may the reviewing court find that such jury instructions did not deprive Petitioner of a fair trial and due process rights?

IV. Where an attacker had admitted to a 911

dispatcher that he went up to Petitioner who was lawfully in his own vehicle and began threatening Petitioner, may the appellate court, both on Appeal and on Application for Reopening, rely on its own interpretation of what "in the process" entails, adding burdens upon the Petitioner not set forth in the statute?

V. Should the Ohio Supreme Court have declined jurisdiction to hear a "test case"under the "Castle Doctrine" which, as interpreted by both trial and appellate courts, denies Petitioner the inalienable constitutional right of self defense as set forth in recent decisions of the Supreme Court of the United States?

VI. Where Petitioner and his co-defendant were tried together both claiming self defense and/or defense of another pursuant to the "Castle Doctrine," was there unequal protection of Petitioner whose co-defendant coming to his rescue was found not guilty and should the Ohio Supreme Court have declined jurisdiction to hear this matter?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, John R. Clellan, respectfully prays that a writ of certiorari issue to review the judgments below of the Tenth District Court of Appeals and of the Supreme Court of Ohio.

OPINIONS BELOW

The opinion and entry of the Ohio Tenth District Court of Appeals appears at Appendix A to the Petition, State v. Clellan (August 17, 2010), 10th Dist. No. 09 AP- 1043, 2010- Ohio-3841.

The opinion and entry of the Ohio Tenth District Court on Application for Reopening and the denial of rehearing appears at Appendix B to the Petition, State v. Clellan (February 9, 2011), Franklin App. No. 09 AP-1043, unpublished.

The entry of the Supreme Court of Ohio appears at Appendix C to the Petition and is unpublished, State v. Clellan (January 19, 2011), Case No. 2010-1711.

JURISDICTION

Petitioner is appealing the declining of jurisdiction by the Supreme Court of Ohio, Ohio v. Clellan, Case No. 2010-1711 decided January 19, 2011 and the denial of the Application for Reopening, State v. Clellan (February 8, 2011), Franklin App. No. 09 AP-1043.

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Second Amendment to the United States Constitution provides, in pertinent part:

". . . the right of the people to keep and bear arms shall not be infringed."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

"In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, Section 1.

The Ohio Revised Code Section 2901.05, Ohio's "Castle Doctrine" provides in pertinent part:

"Burden and degree of proof; presumption concerning self-defense or defense of another; jury instructions concerning reasonable doubt

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmativedefense, is upon the accused.

(A) (1) Subject to division (B) (2) of this section, a person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the de-fensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.

(2) (a) The presumption set forth in division (B) (1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.

(b) The presumption set forth in division (B) (1) of this section does not apply if the person who uses the defensive force uses it while in a residence of

vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.

(3) The presumption set forth in division (B) (1) of this section is a rebuttable presumption and may be rebutted by a preponderance of the evidence.

The Ohio Revised Code Section 2903.21 (Aggravated Menacing) provides, in pertinent part:

"(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person"

STATEMENT OF THE CASE

I. Mr. Clellan's Trial

This case arises from the October 9, 2009 conviction and sentence of the Petitioner, John R. Clellan, in the Franklin County, Ohio Municipal Court, for Aggravated Menacing. The prosecution argued Mr. Clellan without cause pulled a gun on Robert L. Litchfield. The defense presented witnesses that testified that Litchfield admittedly went up to Petitioner stating, "If you're gonna run your mouth, I'm gonna whip your ass." (Transcript p. at 51, lines 5 & 6 and p. at 96, lines 2 & 3). Petitioner was in his own vehicle on his own property when Litchfield, whom Petitioner did not know, came up to him. Petitioner ultimately produced a pistol and demanded Litchfield to get away from Petitioner's truck and off of his property.

On February 4, 2009, the Petitioner's wife, returning home from shopping asked him to bring in some packages from their truck. Petitioner planned to turn the truck around so that it would face out of the driveway. (Transcript p. at 209, lines 18 –23). The ground was covered with ice and snow that day. (Transcript p. at 209, lines 9 –11). There were many embankments of plowed snow on the road and driveways on Darby Boulevard where Petitioner and his wife lived. (Transcript p. at 165, lines 15 – 19). As Petitioner was attempting to turn his truck around, a car driven by Robert L. Litchfield pulled past him and parked crossways in the road blocking Petitioner's driveway in which he was trying to re-park his truck. (Transcript p. at 33, lines 20 – 21).

As Petitioner backed up over a snow bank on his own property in order to pass the stranger's car parked in his way, (Transcript p. at 210, lines 18 – 23), Petitioner's then neighbor, Ms. Devine-Riley, yelled at Petitioner to "wait a damn minute and we'll be out of your way," and words were exchanged between Petitioner and Ms. Devine-Riley. (Transcript p. at 211, lines 5 – 24). Eventually, Mr. Litchfield, for no given reason, involved himself. (Transcript p. at 212, lines 2 –13). The incident escalated when Litchfield approached Petitioner angrily. (Transcript p. at 212, lines 11 – 21). From Litchfield's threats and actions, Petitioner began to believe Mr. Litchfield was "nuts" and intended to harm him. (Transcript p. at 212, lines 20 – 22).

Petitioner was previously victim of two muggings by strangers, one of which resulted in an orbital blow-out fracture to his left eye, leaving his eye vulnerable to any strike. (Transcript p. at 206, lines 18 – 25 and p. at 207, lines 22 – 24). Petitioner, in addition, has a genetic eye disorder that renders him legally blind without special contact lenses that dislodge easily due to the bulging of the eye surface. (Transcript p. at 205, lines 23 – 25 and p. at 206, lines 1 – 7).

Petitioner grabbed his wife's unloaded gun kept in the truck's console and held it at his side. (Transcript p. at 212, lines 22 – 23). Ms. Devine-Riley who was standing on the passenger side of the truck near Litchfield's car's trunk, yelled to Litchfield that Petitioner had a gun. (Transcript p. at 213, lines 9 – 10). At that point, Mr. Litchfield became enraged, charged up to Petitioner's truck door which was open at a right angle to the truck's body with its window completely open and attempted to climb up a snow mound on Petitioner's property to get at Petitioner through the open truck door's open window. (Transcript p. at 213, lines 16, 23 – 24). Ms. Devine-Riley ran up and grabbed Litchfield's coat sleeve, pulling on him and eventually persuading Litchfield to follow her back towards his own car. (Transcript p. at 213, lines 24 –25 and p. at 214, lines 1 – 25). Petitioner put the gun down, shifted the truck into 4-wheel drive and continued backing into his drive and off his snow-mounded lawn. (Transcript p. at 214, lines 18 – 22).

Petitioner's wife had come out of their home when she heard Devine-Riley yelling at Petitioner to "wait a damn minute." (Transcript p. at 168, lines 10 – 21). As Petitioner backed his truck, Devine-Riley and Litchfield chased the truck down the Petitioner's driveway. (Transcript p. at 214, lines 22 – 25 and p. at 215, lines 1 – 2). Petitioner saw his wife being attacked by Litchfield and Devine-Riley and handed the gun to his wife through the open window, telling her to "shoot them if they try to hurt us." (Transcript p. at 215, lines 11 – 13). Petitioner got the truck parked, exited his vehicle and ran to his wife. Together, they made it to their home, locked the door and called the sheriff. (Transcript p. at 215, lines 24 – 25 and p. at 216, line 1).

While Mrs. Clellan was on the phone, she was informed that the deputies were there. (Transcript p. at 216, lines 2 – 3). Petitioner and his wife went outside to speak with deputies at which point the were immediately handcuffed and placed in patrol cars. (Transcript p. at 216, lines 6 – 19). Petitioner was interrogated on dash camera recording, and he and his wife, without being Mirandized, were taken to jail and charged with Aggravated Menacing.

A combined trial was held for Petitioner and his wife before a jury on October 6, 2009. Mrs. Clellan was found not guilty by the jury. (Transcript p. at 325, lines 13 – 19). Petitioner was found guilty by the same jury. (Transcript p. at 325, lines 21 – 25).

II. State Court Appeals

On November 6, 2009, Petitioner filed a Notice of Appeal to the State of Ohio Court of Appeals for the Tenth District. A decision was rendered on August 17, 2010, affirming Petitioner's conviction and sentence in State v. Clellan, 10th Dist. No. 09 AP-1043, 2010-Ohio-3841 and Petitioner timely filed an appeal to the Supreme Court of Ohio, which, on January 19, 2011 declined to accept jurisdiction. On November 15, 2010, an Application for Reopening was filed in the Franklin County, Ohio Tenth District Court of Appeals. On February 8, 2011, a decision was rendered denying Petitioner's Application.

REASONS FOR GRANTING THE WRIT

I. **Where an appellate court reviews an Application for Reopening an appeal based upon a claim of ineffective assistance of appellate counsel, that Court may not find failure to preserve and produce Petitioner's requested dash camera-videoed alleged "confession" of Petitioner after arrest and disputed position of attacker's car in roadway as only potentially useful evidence and not materially exculpatory when such decision conflicts with established appellate case law.**

Clellan argues here and below that the Tenth District Court of Appeals on Application for Reopening entered a decision finding that failure of the state to disclose and produce upon demand (Request for Discovery at Appendix D, Items 2 & 6),

the taped alleged "confession" of Mr. Clellan from a cruiser mounted dash camera which cameras (two cruisers) also would have shown the disputed position of Litchfield's vehicle and the tracks of Clellan's truck and disputed footprints of the attacker (requested to be seen by jury) on Clellan's snow-covered property upon deputies arrival at scene, did not violate Petitioner's due process rights and did not require a dismissal of charge because such evidence "does not address the substance of the charge," as "the video did not capture the activity giving rise to the Aggravated Menacing charge, but only post-incident police activity on arriving at the scene," and therefore the video is "only potentially useful evidence." (See Appendix B, p. at 3, P. 7 and p. at 4, P.7 cont.). The Appellate Court cited State v. Geeslin, 116 Ohio St.3d 252, 2007-Ohio-5239, P. 12 – 13. The Appellate Court's decision regarding the State's failure to disclose or produce dash camera recordings not violating Petitioner's due process rights is in conflict with the decisions of other courts of appeal on this matter. (see e.g. State v. Benton (2000), 136 Ohio App.3d 801 (failure to preserve highway patrol tapes, in light of discovery motion, required dismissal; State v. Benson, 152 Ohio App. 3d 495, 2003-Ohio-1944 (due process rights were violated when tape from cruiser mounted dash camera was destroyed following discovery request). The evidence should have been found to be materially exculpatory in the instant matter, especially in light of the fact that the Appellate Court in its decision of August 17, 2010 recounts fully Deputy Felkner's testimony about what Petitioner purportedly "confessed" on camera in the back of the

police cruiser. Without the production of the dash camera recording, the deputy was at liberty to testify that Petitioner stated whatever the deputy wished him to have said, and further, not mention that neither Petitioner or his co-defendant wife were ever "Mirandized." The officer's "carte blanche" ability to essentially confess for Clellan was so materially damaging to Petitioner's case that even those same appellate judges relied heavily upon the officer's rendition of Petitioner's purported statement on camera in their direct appeal decision:

> "Deputy Brian Felkner also provided testimony supporting Litchfield's version of the events, testifying defendant changed his story about what occurred. Defendant initially told Felkner that Litchfield tried to pull him out of his vehicle by reaching through the window. When Felkner asked defendant how he could brandish a firearm while being pulled out of the truck, defendant admitted Litchfield was not pulling him from the vehicle, but only reached into the truck's window. Confused about why Litchfield would reach into the vehicle without doing anything else, Felkner inquired further. Defendant then admitted Litchfield did not reach into the vehicle; defendant only thought Litchfield would do so." (see Appendix A at p. 9, P.22, emphasis added).

The Appellate Court continued addressing the obvious weight of Officer Felkner's testimony regarding Clellan's recorded "confession," by stating:

> "Given the discrepancies in testimony Litchfield

> and defendant offered, the jury could have reasonably found Felkner's testimony (of Clellan's alleged "confession"on dash camera video) supported Litchfield's version of events and thus concluded Litchfield was not in the process of unlawfully and without privilege entering defendant's vehicle." (Id., at p. 9 & 10, P. 23).

Thus, even the Appellate Court agreed such purported "confession" Deputy Felkner testified to could have persuaded the jury to find Petitioner guilty by removing his defense under the "Castle Doctrine." (see Appendix H). Petitioner asserts his admittedly recorded "confession" would have refuted the officer's testimony regarding such. The Appellate Court in its February 8, 2011 decision, however, citing State v. Glunt, 10th Dist. No. 09 AP-962, 2010-Ohio-3024 at P. 13, asserted:

> "Evidence is materially exculpatory if 'There is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the court held:

> "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (see also Kyles v. Whitley, 514 U.S.419, 432 (1995).

The Appellate Court's two decisions are inherently at conflict with each other as well as with the abounding case law on this discovery issue.

II. **Where an appellate court denies an Application for Reopening an appeal as stated above, that Court may not find failure to produce in discovery a deputy's statement presented the second day of trial and entered into evidence by the trial judge without objection from Petitioner's counsel not prejudicial to him or to the outcome of his case, without examination of that officer's statement/exhibit and relying only on the transcribed description of such evidence.**

On March 10, 2009, trial counsel served a Request for Discovery upon the State. (see Appendix D). Notably, the Request for Discovery asked for:

> 2. Copies of any written or recorded statements made by defendant or any co-defendant, or written summaries of any oral statements made by the same to any law enforcement officer . . .
>
> * * *
>
> 6. Disclosure of any evidence known or which may become known to the Prosecuting Attorney favorable to the defendant and material to either guilt or punishment per Ohio Criminal Rule 16(B)(1)(f).

Despite this request, the State did not produce copies of a statement attributed to Clellan by Deputy Brian Felkner until the second day of trial, (Transcript at p. 77 – 78) at which time the State brought a potential evidentiary issue regarding such statement attributed to Clellan but signed by the officer to the Trial Court's attention. Mr. Clellan's counsel did not object to the introduction of the purported statement, did not move to have the statement or any associated testimony excluded, and instead simply excused the nondisclosure as "either inadvertence or omission . . . We're not going to make an issue of it." (Transcript at p. 78, lines 1-16). Having failed to provide this statement in discovery, the Trial Court should have sanctioned the State by dismissing the charges against Clellan, or at a minimum, by excluding Deputy Felkner's testimony attributed to Clellan. (see e.g. State v. Bidinost (1994), 71 Ohio St.3d 449, 456 – 457; see also State v. Benton (2000), 136 Ohio App.3d 801; State v. Benson 152 Ohio App.3d 495, 2003-Ohio-1944).

Petitioner's trial and appellate counselors' performance here fell below standards set forth by the by the United States Supreme Court in Strickland v. Washington (1984), 466 U.S. 668. A two-prong test requires a defendant to show: 1) counsel's performance was deficient; and 2) the defendant was prejudiced. Id. A defendant establishes counsel's deficient performance when that performance falls below an objective standard of reasonableness and the client is prejudiced by counsel's breach of duty. Strickland, 466 U.S. at 690,

696. As for the prejudice step of the Strickland test, the Court stated;

> "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Strickland, 466 U.S. at 694.

Foreknowledge of the statement would have aided Mr. Clellan's defense and admission of the statement as an exhibit for the jury was certainly prejudicial to Petitioner as it directly contradicted his testimony. As such, the Trial Court should have excluded the statement and any related testimony by Deputy Felkner. Id.; see also State v. Parson (1983), 6 Ohio St.3d 442, 445. The errors of Clellan's trial counsel are outrageous and by appellate counsel failing to raise these evidentiary issues as ineffective assistance of counsel errors on appeal, Clellan's appellate counsel deprived him of a real opportunity to have his conviction vacated and the case re-tried.

These errors were so serious that counsel was not functioning as the "counsel" the Sixth Amendment (see Appendix F), guarantees. Strickland v. Washington, (1984), 466 U.S. 668, 687, 104 St.Ct. 2052, 2064.

The Appellate Court on Application for Reopening the appeal (see Appendix B), although provided with Deputy Felkner's statement as an exhibit (actually

entered into evidence by the trial judge, herself), (Transcript at p. 154, lines 7 – 10), did not examine the actual disputed document. Instead, the Court stated:

> "Although defense counsel on page 78 of the trial transcript alluded to a 'purported statement from our clients that we had not gotten until today,' we are unable to determine the nature of the statement or its content." (see Appendix B, at p. 4, P. 8).

The Court therefore ruled it "lack(s) a basis to conclude, as defendant argues, that the State's failure to produce the 'statement' earlier in the proceedings prejudiced him or probably would have resulted in a different outcome at trial . . ." Id. Although the Appellate Court referred to itself as a "thirteenth juror," it, unlike the actual jury, did not read or regard the statement presented as an exhibit at trial and provided to the Appellate Court upon appeal.

The defense was denied access to Officer Felkner's statement that was used to impeach Petitioner's testimony. In Banks v. Dretke 540 U.S. 668, 124 S. Ct. 1256, (2004), the Court stated that "a rule that 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process[,]." In light of such instances of disparate testimony, the Trial Court committed prejudicial, reversible error by refusing to permit defense counsel access to the underlying police

statement. "The right of counsel for the accused to confront, cross-examine and impeach is cherished and remains the means by which 'the scope and the truth of his testimony are tested.'" Davis v. Alaska, 415 U.S. 308, 316 (1974) (Burger, C.J.) The State's denial of prior access to the deputy's statement upon request violated due process by the inclusion of impeaching evidence and denied the Petitioner a fair trial. The Petitioner Clellan has lost an opportunity in front of the jury to challenge the State's most important witness on his understanding and representation of what Mr. Clellan actually stated to him. One particular apparent discrepancy in Petitioner's alleged statement to the deputy might have been fielded by Petitioner and explained had he had foreknowledge of the officer's written statement:

> "Defendant initially told Felkner that Litchfield tried to pull him out of his vehicle by reaching through the window . . . Defendant then admitted Litchfield did not reach into the vehicle; defendant only thought Litchfield would do so." Appellate decision of August 17, 2010 – State v. Clellan, 10th Dist. No.09 AP-1043, 2010-Ohio-3841 at p. 9, Section 22. (see Exhibit A).

Petitioner if granted the foreknowledge and opportunity would have explained to the jury that the door of the truck was swung open with the window rolled completely down, thus giving rise to the situation whereby Litchfield grabbed through the open window and yet did not reach into the vehicle because the door was open and Litchfield's arm was

not long enough at that point to reach into the truck cab, although he was attempting to do so. The allowance of the deputy's statement at trial was tantamount to trial by ambush.

III. **Where a "test case" for the "Castle Doctrine" is presented to a jury along with an improper Proposed Jury Instruction regarding Ohio Revised Code Section 2901.05 (see Appendix H), that was further improperly modified by the trial court, the reviewing court may not find such confusing jury instructions did not deprive Petitioner of a fair trial and due process rights.**

On March 16, 2009, trial counsel submitted a Proposed Jury Instruction regarding Ohio Revised Code Section 2901.05, more commonly known as the "Castle Doctrine." (see Appendices J & H). Trial counsel's Proposed Jury Instruction is an incorrect and incomplete statement of the "Castle Doctrine." Left out of the Proposed Jury Instruction are the two conditions that actually can rebut the presumption of self defense, namely Ohio Revised Code Section 2901.05 (B)(2)(a) and (b):

> 2(a) The presumption set forth in division (B)(1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of the residence or vehicle.
>
> (b) The presumption set forth in division (B)(1) of this section does not apply if the person who uses the defensive force uses

> it while in a residence or vehicle and the person is unlawfully and without privilege to be, in that residence or vehicle. (see Appendix H).

Once Ohio Revised Code Section 2901.05(B)(1) applied, Clellan was entitled to a presumption that he acted in self-defense and he had no burden to prove anything else related to the events of February 4, 2009. However, the Proposed Jury Instruction ignored these conditions the State had to prove in order to rebut Clellan's presumptive defense per Ohio Revised Code 2905.01. There was no evidence in the record that Litchfield (the person against whom defensive force was used) had a right to be in Clellan's truck or that Clellan was unlawfully, and without privilege to be, in his truck. Accordingly, the State failing to meet its burden, Clellan was entitled to a presumption of self-defense under the "Castle Doctrine." The jury's consideration of Clellan's defense was tainted by trial counsel's incomplete and erroneous Proposed Jury Instruction that confused the Ohio Revised Code Section 2905.01 inquiry. Without jury interrogatories, this Court has no insight into where the jury may have been led astray in its deliberations and application of the "Castle Doctrine." The proper result was for the conviction to be vacated and a new trial held.

Compounding trial counsel's error was the Court's attempt to revise the actual jury instruction and his failure to object to the modification. Language was added by the trial court to the instruction stating:

> "While the burden is always on the defendant to prove self-defense, the law creates a presumption that the person acted in self-defense in certain circumstances. This means that if you find by a preponderance of the evidence that the following factors are true, you must find that the defendant acted in self-defense and must enter a verdict of not guilty. (Transcript p. at 312, lines 1 - 9).

The "factors" the Court is referring to are not those explicitly set forth in Ohio Revised Code Section 2905.01(B)(2)(a) and (b), but are two new factors erroneously proposed by trial counsel, namely that Clellan used defensive force and that Litchfield was in the process of unlawfully entering Clellan's vehicle. This combination resulted in an improper jury instruction (see Appendix K), concerning the "Castle Doctrine."

Trial counsel failed to object to Court's instruction and therefore, "[t]he failure to object to a jury instruction constitutes a waiver of any claim of error relative thereto, unless, but for the error, the outcome of the trial, would have been otherwise. State v. Underwood (1983), 3 Ohio St.3d 12, at syllabus. Absent plain error, the failure to object to improprieties in jury instructions, as required by Ohio Criminal Rule 30, is a waiver of the issue on appeal. State v. Underwood, 3 Ohio St.3d citing; State v. Williams (1977), 51 Ohio St.2d 112.

Appellate counsel's failure to recognize trial counsel's error and present it as part of the

ineffective assistance of counsel argument on direct appeal, so prejudiced Petitioner in that it forfeited the opportunity to have the issue reviewed by this Court and the opportunity to have his conviction vacated and the case remanded for a new trial where the jury's deliberations would not be tainted by this misstatement of the "Castle Doctrine."

However, the Appellate Court on appeal did raise the issue of the presumption of self-defense under Ohio Revised Code 2901.05 as relates to instructions to the jury in its analysis of Petitioner's assignment of error on the basis that his conviction was against the manifest weight of the evidence. (see Appendix A, p. at 8, P. 20). The Court states that:

> "Defendant initially argues the jury lost its way because the prosecution never rebutted the presumption of self-defense set forth in R.C. 2901.05(B), sometimes referred to as the 'Castle Doctrine.' (see Appendix A, p. at 8, P. 20).

Unfortunately, the Appellate Court proceeds to quote from the instructions to the jury as if there were no apparent problem with their recital of the "Castle Doctrine," and loses its own way in interpretation and application of the plain language of the Statute.

The Appellate Court in its decision of February 8, 2011, (see Appendix B, p. at 5, P. 10), states that "The trial court is not required to instruct on matters the evidence does not implicate," citing State v. Scott

(1986), 26 Ohio St.3d 92, 101. The Appellate Court has first determined that an unproduced officer's statement regarding Clellan's purported "confession" upon arrest and the destruction of the very dash camera recording of that "confession" were not prejudicial to Petitioner's case, yet counter this position by asserting:

> "any presumption of self-defense was eliminated (up)on the jury's believing the person against whom defendant used force did not attempt to enter defendant's vehicle, **a proposition the deputy sheriff testified defendant ultimately admitted was true.** As a result, defendant's argument concerning jury instructions fails to support his contention that the additional instructions, with reasonable probability, would have produced a different outcome at trial." (see Appendix B, p. at 5, P. 10).

The Court is essentially using a circular argument that destroyed dash camera videos and an undisclosed purported "confession," though not deemed materially exculpatory evidence, are now proof that a morass of cobbled jury instructions could not have caused any real problems for Petitioner who was doomed anyway due to evidence destroyed and not timely produced. The variables in this case, the destroyed dash camera recording, the officer's undisclosed statement pertaining to Clellan's supposed "confession," the officer's testimony of Petitioner's alleged oral statement and the baffling

jury instructions conspired to boot-strap the Court's position and ensured Petitioner's conviction, thus depriving him of a fair trial and due process under the law.

IV. **Where an attacker had admitted to a 911 dispatcher that he went up to Petitioner who was lawfully in his own vehicle and began threatening Petitioner, the Appellate Court, both on appeal and on Application for Reopening, may not rely on its own interpretation of what "in the process" entails, adding onerous burdens on the defense not intended by the "Castle Doctrine."**

The Appellate Court on direct appeal asserted Petitioner had failed to meet proof of the "second" factor and then proceeded to create yet a "third" factor which hurdle Petitioner had not cleared: 2) (a) whether Litchfield (the aggressor) was in "the process," and (b) whether Petitioner occupied the vehicle because he was at times standing on the rocker panel or running board of the truck although the engine was still running. Throughout its decision, the Appellate Court continued to add burdens to Petitioner's presumption of self-defense, stating that Litchfield, "never touched it (truck)," that Litchfield may have reached through the window, but did not reach into the cab of the truck, that Petitioner was standing, but not seated at all times in the truck and therefore was not technically "in" the truck. The statute does not set forth that the aggressor must "grab the handle," as the Prosecutor

alleged (although many vehicles do not even have doors let alone handles), or that the person must "touch" or "reach into" the vehicle to be "in the process" of entering a vehicle, or even what "in the process" actually means. The word "vehicle" is defined in the statute as well as the word "residence," but nowhere is it outlined as the Court appears to believe it is what is necessary for a "process" to begin. Further, although the statute clearly includes the porch of a residence within the protected area, the Court did not find a running board, rocker panel or floorboard to be analogous to a deck or porch on a house. No attempt was made by Petitioner's counsel, appellate or otherwise, to address the truth that anyone found in the position of Petitioner in a vehicle and charged with D.U.I. would have been found to be in control of or "occupying" that vehicle. Much is also made of the fact that the Petitioner was alleged to have stated that he only "thought" Litchfield would reach into Petitioner's truck. It begs the question as to how "in the process" is established and whose perceptions are to be determinative when assessing whether someone is "in the process." Petitioner asserts that any action taken with the intention or appearance of a hostile end toward an occupied vehicle constitutes being "in the process," according to the "Castle Doctrine." Petitioner further asserts that it is not necessary for one to be "in" a vehicle to "occupy" it. There is no means by which a person might be considered to be "in" a motorcycle for example and yet such a conveyance is included within the parameters of vehicles under the "Castle Doctrine."

The Appellate Court in its decision of August 17, 2010 recited:

> "Pursuant to the provisions of R.C. 2901.05(B), the court instructed the jury that if it were to find by a preponderance of the evidence (1) 'the defendant used defensive force,' and (2) 'the person against whom the defensive force was used was in the process of unlawfully and without privilege to do so, entering the residence and/or vehicle occupied by the defendant,' then the jury must find defendant acted in self-defense and enter a verdict of not guilty." (Tr. 312). (see Appendix A, p. at 8, P. 20).

The Appellate Court in its decision rendered August 17, 2010, stated that of the "two factors,"only the second was disputed. (see Appendix A, p. at 8, P. 20). In other words the Court conceded that the Petitioner had acted using **defensive force**. Even the Clellans' trial Prosecutor Kristen Rine during a related trial stated that, "These people (Clellans) have used guns to **protect** themselves before." (State v. Clellan, Case No. 10AP-44, Decision of December 2, 2010, finding trial court Judge Andrea Peeples abused her discretion by denying expungement to Clellan who was found not guilty; Transcript from expungement hearing, p. at 3, lines 14 & 15).

The Court states, however, the second "factor" is disputed in that parties "presented conflicting evidence whether the instigator was in the process of

unlawfully entering defendant's vehicle and whether defendant occupied the vehicle." Petitioner submits the State's witness in such a matter will always present "conflicting evidence" in any case wherein a defendant has made a not guilty plea. Much that the Appellate Court has taken to be "conflicting," when viewed in context is not, in fact, conflicting. The instigator in the instant case in a 911 recording, entered into evidence by the prosecution (see Appendix L), states: "I went **up to him** and said, '**If you're gonna run your mouth** . . .' you know, whatever." (Transcript p. at 51, lines 5 & 6 and p. at 96, lines 2 & 3). This statement by the instigator was made in the "heat of the moment" and certainly constitutes an admission against interest regarding his actual process on the scene. Litchfield further testified he had exited his own vehicle **angry** (Transcript p. at 100, lines 8 – 14 and p. at 105, lines 18 – 24), and he "**had (his) arms up**. I said, "What the f _ _ _ is your problem?" (Transcript p. at 40, line 4). Dressed like a mobster in a full-length black leather coat and sporting a foot and a half long ponytail, he instantly took an aggressive posture. His companion, Devine-Riley, testified she did not know why Litchfield even got out of his car at that time and did not leave his vehicle for four or more minutes after her first confrontation with Petitioner and that no threats were made prior to Litchfield entering the scene. Mr. Litchfield, in fact, testified Petitioner was scared of Litchfield. (Transcript p. at 103, lines 20 –23).

It is in the public interest for the mystery of terms of the "Castle Doctrine" to be dispelled and clarified

for the citizenry to better rely upon it and not upon some ambiguous or arbitrary interpretation of the law. Confusion in the law must be dealt with or people will act upon its vagaries. It must, for the public interest's sake, be determined why Petitioner's perspective and assessment of his observations should not be held to be relevant in terms of this Statute, if, indeed, they are not. The purpose of the Statute is of paramount importance. Is it to protect vehicles or occupants, or both? What if the instigator's sole intention is to drag the driver out of his truck and thrash him, not to commandeer or even enter the vehicle? What if the instigator's attempts to enter are woefully inadequate or are met with the successful resistance of an armed occupant? Does the "Castle Doctrine" not grant assistance to the Petitioner who has only his own "heat of the moment" perceptions upon which to instantly respond?

By the courts permitting piece-meal and conflicting interpretations of the "Castle Doctrine," and the Statute's inherent failure to provide clear definitions for crucial terms, the "Castle Doctrine" creates a wide chasm making it far more beneficial had Petitioner <u>not</u> been in a vehicle due to the court's argument that he "could have just driven away" (when retreat was not contemplated by the statute's drafters), or that he was not properly "occupying" his vehicle in order to avail himself of its intended protections, or that the intruder was not "in the process" unless and until some mythical demarcation is traversed by him. The courts and law enforcement will continue to undermine the legislative intent of those drafters of the "Castle Doctrine," ignoring the plain meaning of text, and creating their own

unsupported view of self-defense, unless and until the Supreme Court of the United States exercises its supervisory power to protect the inalienable right of self-defense of our citizens.

V. The Supreme Court of Ohio should not have declined jurisdiction to hear a "test case" under Ohio's new "Castle Doctrine" which as interpreted by the Trial and Appellate Courts denies Petitioner the constitutional right of self-defense.

Petitioner asserts that it is within the jurisdiction of the Supreme Court of Ohio and of the Supreme Court of the United States of America to uphold the constitutional and inalienable right of self-defense. It appears to Petitioner from comments from the judges of the courts of Ohio that the use of a gun to protect oneself or a loved one from the threat of violence, even to ward off an attack from a person intent on doing evil, is anathema to a majority of the courts' members. The fact that the "Castle Doctrine" was drafted, met with vehement resistance from both court officials and police officers in the great State of Ohio, and yet passed into law in September 2008, is ample proof that the citizenry of Ohio wish to maintain the right of self-defense and defense of others in a mounting onslaught of violent and drug-addicted would-be attackers and perverts. The sentiment of anti-gun advocates, including numerous judges, court officials, police officers, politicians and high-profile testimonial tub thumpers is capsulated in the off-hand comment of one of the prosecutors who tried Petitioner's criminal case. She stated that it was "alright to own a gun, just not to use one." (Franklin County, Ohio Prosecutor Orly

Ahroni at oral argument in Case No. 10AP-44, Tenth Appellate District Court of Appeals of Ohio). Petitioner asserts that the "Castle Doctrine" implemented in Ohio in 2008 does not provide for self-defense or the defense of others by any means other than by the use of a firearm weapon. The "Castle Doctrine" has become an entrapment tool for good, law-abiding citizens who are assaulted or threatened with immediate harm and rely on it to their detriment. Ohio courts have not been successful in attempts to ban gun ownership and possession of firearms by common, decent persons in the state, however, through willful and vehement disregard of the laws using overlays of hindsight bias and through bogus interpretations of the provisions of self-defense statutes, the rightful use of guns for self-protection is being eroded and the autonomy and self-preservation of a free people is now in grave danger. Petitioner respectfully requests the Supreme Court of the United States to intervene on his behalf and on behalf of those other lawful persons in like circumstances.

VI. Where Petitioner and his co-defendant were tried together, both claiming self-defense/or defense of another based on the new "Castle Doctrine," there was unequal protection of Petitioner whose co-defendant (who came to his rescue) was found not guilty by the same jury.

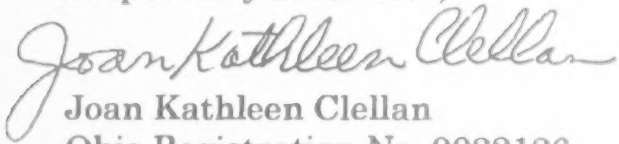
Given the fact that the jury found Petitioner's co-defendant not guilty based on the same facts, laws and testimony, this was significant error. The inconsistent verdicts of Petitioner and his co-defendant who testified she had come to his defense while under attack, would suggest there was unequal protection under the law. Petitioner was denied constitutional rights to equal protection under the Fourteenth Amendment of the United States Constitution, (see Appendix

G), due to the fact he received arbitrary results in having been found guilty, while his wife who was charged with the same crime and participated in the same endeavor to protect Petitioner and herself, and claimed the same defenses under the same statutes, was found not guilty by the jury. This ought not to be so.

CONCLUSION

Petitioner John R. Clellan implores that this Court will please grant his petition for writ of certiorari to address the questions presented and determine whether the Tenth District Court of Appeals and the Supreme Court of Ohio invoked an incorrect standard of review in first affirming his conviction in the trial court, then denying his Application for Reopening the Appeal and finally declining jurisdiction to hear his case and dismissing the appeal as not involving any substantial constitutional question.

Respectfully submitted,



Joan Kathleen Clellan
Ohio Registration No. 0022126
P. O. Box 492
Galloway, Ohio 43119
(614) 561-8657

Counsel of Record
Counsel for Petitioner Clellan